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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 367

FEDERAL POWER COMMISSION,
Petitioner

vs.

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION OF THE STATE OF INDIANA TO APPEAR *amicus curiae* AND ADOPT BRIEF OF RESPONDENTS

EDWIN K. STEERS,
Attorney General of the
State of Indiana,
State House,
Indianapolis, Indiana.

C. L. Harlan & Co., Inc., Indianapolis

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MOTION

Comes now the State of Indiana, in its sovereign capacity, by Edwin K. Steers, its Attorney General, and moves the Court for leave to appear in this Cause as

amicus curiae and in lieu of filing a brief of amicus curiae to adopt the briefs of the respondents filed herein.

For grounds in support of its Motion, the State of Indiana respectfully submits that the issues in this action and the determination thereof as may be reached are of vital interest in that:

> Water resources, including those of navigable and non-navigable watercourses flowing within Indiana, are the grave concern of an intense public interest of its citizens, its agriculture, its industry and its communities depend thereon. It is not without authority that the State of Indiana seeks the opportunity to urge that the careful husbandry by the sovereign states of water resources to their best local uses is, in fact, controlling and conserving a national resource to its highest use. This concept of the national public interest and strength clearly was within the contemplation of public policy at the time of enactment of The Federal Water Power Act(1)

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(1) *Senate Report No. 179, 65th Congress* (1917):

"(T)he bill is so framed as to protect and maintain the *constitutional power and control of the Federal Government over navigable streams, as well as the sovereignty of the States and the rights* of riparian proprietors over and in the beds and waters of those streams, *and allow the full exercise and enjoyment of the latter,* subject to the paramount authority of Congress to regulate the same for navigation purposes." (Italics Supplied).

56 Congressional Record 9110:

"This bill is not based on either the Government's ownership or its sovereign authority, *but on the hypothesis* that *we as representatives of the States* have authority to act for the States in matters of this character and pass laws for the general

Indiana long has had a stern public policy for the sound conservation of water resources to those basic needs peculiar to Indiana industry, agriculture and community welfare. In formulating that public policy particular emphasis has been directed not only to the control of the wastes and ravages of flood, but to the stay of further depletion, abuse and exploitation of the less than abundant water resources presently available in the streams of the State.

The legislative manifestations of that public policy are found in the enactments of Statute.(2)

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good, by the establishment of a limited trusteeship or commission composed of officials of the Government, *to carry out and administer this law in such a way as not to infringe any of the rights of the States* nor to impede or restrict navigation, but rather to benefit it. * *" (Italics Supplied)

"If we put in this language (of Sec. 9(b)), which is practically taken from that Supreme Court decision (United States v. Cress, 243 U. S. 316, 37 S. Ct. 380, 61 L.Ed. 746), as to the property rights of the States as to the bed and the banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property. * * * We are earnestly trying not to infringe the rights of the States."

(2) (a) *Indiana Economic Council:*

"There hereby is created the Indiana Economic Council to consist of twenty-two (22) members * * *. Members of the Council shall receive no compensation."

(Acts 1943, Ch. 260, Sec. 1, P. 731, Sec. 60-1401, Burns' Ind. Stats. Ann. 1933 (1951 Repl.)).

* * * * * * *

"It shall be the duty of the Council to make a thorough study of the natural resources of the State * * *. "* * the

conservation of forests, soil, stream flow * * * and for adequate provision for the future population of the State."

(Acts 1943, Ch. 260, Sec. 2, P. 731, Sec. 60-1402, Burns' Ind. Stats. Ann. 1933 (1955 Repl.)).

(b) *Indiana Flood Control And Water Resources Commission:*

"It hereby is declared * * * (c) that the water resources of the state, which have been diminishing, should be accumulated, preserved and protected to prevent any loss of waste beyond the reasonable and necessary use thereof, and (d) that a master plan or comprehensive plan for the entire state, to control floods, and to accumulate, preserve and protect the water resources, should be investigated, studied and prepared; policy and practices established, and the necessary works constructed and placed in operation."

(Acts 1945, Ch. 318, Sec. 2, P. 1480, Sec. 27-1102, Burns' Ind. Stats. Ann. 1933 (1948 Repl.)).

* * * * * * *

"The Commission shall have jurisdiction over the public and private waters in the State * * *, and shall make and formulate plans and recommendations for the further development, protection and preservation of the water resources of the state."

(Acts 1945, Ch. 318, Sec. 15, p. 1480, Sec. 27-1115, Burns' Ind. Stats. Ann. 1933 (1948 Repl.)).

* * * * * * *

"It shall be unlawful * * *, which will adversely effect the efficiency of or unduly restrict the capacity of the floodway, and the same are declared to be and to constitute public nuisances."

* * * * * * *

"The commission shall have the power to remove or eliminate any structure, obstruction, deposit or excavation in any floodway which adversely affects the efficiency of or unduly restricts the capacity of the floodway, by an action in condemnation, * *"

(Acts 1945, Ch. 318, Sec. 17, P. 1480, Sec. 27-1117, Burns' Ind. Stats. Ann. 1933 (1948 Repl.)).

(c) *Conservancy Act of Indiana:*

"* * * for all or any of the following purposes:

(a) of preventing floods;

(b) of regulating streams channels by changing, widening and deepening the same;

(c) of reclaiming or of filling wet and overflowed lands;

(d) of providing for irrigation where it may be needed;

(e) of regulating the flow of streams and conserving the waters thereof;

(f) of diverting, or in whole or in part eliminating water courses;

(g) of providing a water supply for domestic; industrial, and public use;

(h) of providing for the collection and disposal of sewage and other liquid wastes produced within the district;

(i) of providing forests, wild life areas, parks and recreational facilities. * * *"

(Acts 1947, Ch. 239, Sec. 3, p. 902, Sec. 27-1203, Burns' Ind. Stats. Ann. 1933 (1948 Repl.)).

"All of the territory included in such district shall constitute a taxing district for the purpose of levying the special benefit taxes for all purposes set forth in this act."

(Acts 1947, Ch. 239, Sec. 7, P. 902, Sec. 27-1207, Burns' Ind. Stats. Ann. 1933 (1948 Repl.)).

* * * * * * *

"For the purpose of unified actions and the betterment of flood control and the water resources over the entire state of Indiana the Indiana flood control and water resources commission is hereby designated as the state agency in control of the flow of water in the state of Indiana and it shall have the right to intervene on behalf of the state of Indiana in any proceeding wherein the district is petitioning the court for permission to construct any ditch, canal, levee, dike, dam, sluice, revetment, reservoir, holding basin, floodway or any other works which could affect the flow of water outside the boundaries of the district. * *"

(Acts 1947, Ch. 239, Sec. 10, p. 902, Sec. 27-1210, Burns' Ind. Stats. Ann. 1933 (1948 Repl.)).

Such legislation is sensitive to the basic specific water needs of the agriculture, the industry and the communities in relation to the available supply and sources in proximity thereto.

It is obvious that it was not the intent of the framers of The Federal Water Power Act to be heedless of these basic State needs. Their expressions therein quoted in no way imply that the federal commerce powers were to be administered by the Petitioner Commission by assuming jurisdiction of waters not bona fide navigable, nor to control those which be in fact navigable without consideration to the basic needs peculiar to industry, agriculture and community life local thereto.

An adverse decision herein well could operate to invite future invasions by federal administrative authority (a) which are in oversight of the express

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"The rights of landowners, municipalities, corporations and other users of water to the waters of the district for domestic use, water supply, industrial purposes, for water power, or for any other purposes shall extend only to such rights as were owned by them prior to the organization of the district, and to such use as could be made of such waters if the improvements provided by the district had not been made. * *"

"All the rights and property of the district in the waters and water courses of the district, and in their uses, shall be exercised in such manner as to promote the welfare of the district, and of all inhabitants thereof, and to promote the safest and most economical and reasonable use of the waters thereof; to encourage and promote industries and agriculture, and to pay the cost of the construction and maintenance of the improvement. * * *"

(Acts 1947, Ch. 239, Sec. 27, P. 902, Sec. 27-1227, Burns' Ind. Stats. Ann. 1933 (1948 Repl.)).

restrictions of the very law which created the administrative agency (Federal Power Act, Sec. 9(b)), and (b) which well might impose uses upon the diminishing water resources within the sovereign states which be heedless of critical local need thereof to sustain the agriculture, industry and community life dependent thereon.

The sound precedents of this Court in the past have repeatedly affirmed that neither by administrative caprice nor legislative act is the public interest of state or nation served by the wresting from the states of their reserved right to make and determine for themselves the best uses to be made of those waters which are not squarely related to or vital for the maintaining of the flow of commerce between the states.

The State of Indiana thus moves the leave of the Court to join in urging the principles upon which the State of Oregon supports its position as Respondent in this Cause.

Edwin K. Steers,
Attorney General,
State of Indiana.